IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 33

UNITED MINE WORKERS OF AMERICA, DISTRICT 12,

Petitioner,

—v.—

ILLINOIS STATE BAR ASSOCIATION *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, BRIEF *AMICUS CURIAE*, AND MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

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Motion for Leave to File Brief *Amicus Curiae*

Movants NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, respectfully move the Court for permission to file the attached brief *amicus curiae* and assign the following reasons.

During the past thirty years, the legal profession has come to recognize that its goal of providing all Americans with adequate legal representation cannot be achieved through exclusive reliance upon the traditional attorney-client relationship. In some instances, clients in need of legal assistance are totally indigent, and cannot afford to hire a lawyer. In others, clients are indigent in the sense that they cannot possibly afford to pay the legal fees

charged in a complex case. In still other instances, clients who can afford counsel cannot find an attorney willing to handle their cases, because their causes are unpopular (as in civil rights litigation in the deep South).

The incorporation of petitioner Legal Defense Fund twenty-eight years ago was one of the earliest reactions to the newly recognized need for new forms of legal service. The Fund employs a staff of over twenty lawyers who represent Negroes all over the nation in cases involving equal opportunities in education, employment, housing, and economic security, as well as in criminal cases. Its salaried lawyers receive no fees from its clients; the Fund's budget is derived primarily from private donations.

Last year the Fund established as a separate corporation movant National Office for the Rights of the Indigent (NORI) as another response to the manifest need for legal services which cannot be satisfied by private practitioners alone. It too is an association employing salaried attorneys, and its income is provided initially by a grant from the Ford Foundation. NORI is cooperating with lawyers in both urban and rural areas to assist the poor in individual cases and at the same time to suggest to appellate courts the need for changes in legal doctrines which unjustly affect the poor. NORI is currently involved in cases concerning public welfare, urban renewal, public housing, garnishment rules, and consumer frauds. It works closely with attorneys in neighborhood legal offices established under the Economic Opportunity Act of 1964. These offices represent still another attempt to expand legal service so that everyone in need of counsel may have it.

Many of the experiments providing new forms of legal service described in Section II of the appended brief

(pp. 14-26) can be described as forms of "group legal service." Yet such services are often deemed unethical by state and local bar associations. The present case is a typical instance in which an attempt to provide a large number of persons with inexpensive legal assistance is being stifled by a state bar association. The legal doctrine announced by the Illinois Supreme Court, we submit (brief, pp. 26-34), threatens not only the effort of the Mine Workers Union to help solve some of the legal problems of its members, but jeopardizes, to a greater or lesser extent, all these experiments in group service. Our own operations, the neighborhood law office programs funded by the federal government, and of course the more classic forms of group legal service (such as that established by the Mine Workers)—all are threatened by this doctrine. And even were the Illinois Court's doctrine definitively restricted to the latter category of service, a major objective of the Legal Defense Fund and NORI—the extension of legal service to all Americans who need it—would be severely retarded. Reaching the objective of adequate legal services for all is an enormous undertaking requiring not one, or ten, but perhaps thousands of experiments in group legal services. To the extent doctrines which cripple this necessary experimentation are allowed to flourish, the Legal Defense Fund's and NORI's objectives are frustrated. Therefore, we respectfully submit that the views of movants may be of interest to the Court.

We have asked permission of the parties to file this brief *amicus curiae;* counsel for petitioner consented but counsel for respondents Illinois Bar Association *et al.* refused.

WHEREFORE movants pray that the attached brief *amicus curiae* be permitted to be filed with this Court.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

Statement of the Case

For many years, the Mine Workers Union has employed a licensed attorney, who represents members and their dependents, if they so desire, in Workmen's Compensation cases. The attorney is paid $12,400 per year by the Union, and receives no additional fees from the members he represents. Members are free to employ outside counsel if they prefer. Among the conditions of the attorney's employment by the Union is the stipulation that "you will receive no further instructions or directions and have no interference from the District [Local] nor from any officer,

and your obligations and relations will be to and with only the several persons you represent." The attorney seeks to achieve settlements fair and acceptable to the claimants; when he cannot reach such a settlement with the company, he represents his client before the Industrial Commission of Illinois. The worker receives the full amount of the settlement or award.

The Illinois State Bar Association alleged that this procedure constituted the unauthorized practice of law by the Union, and secured an injunction from the circuit court of Sangamon County restraining the Union's continued employment of the attorney to represent individual members. The Union unsuccessfully contended there and in the Illinois Supreme Court that its activities are constitutionally protected.

Summary of Argument

In recent years, it has become increasingly evident that most Americans are not receiving the legal services they vitally need. We have begun to recognize that just as all of us need routine medical care, legal assistance is also a routine need in a complex society. Persons in every bracket, from the very rich to the very poor, have this need, yet very few can afford the legal help they need, given the high demand for lawyers, the small supply, and the prevailing method of providing and paying for legal services (pp. 9-14).

Elements in the legal profession have responded to this challenge by devising many new forms of service. The new forms both lower the costs of service by incorporating economic efficiencies and spread the costs among members

of groups so that no staggering costs fall upon a single unfortunate individual. Today's experiments in providing legal service parallel recent changes in the provision of medical service. Among the types of programs that might be included in the term "group legal service" are club legal services, legal insurance, institutions providing legal service to further a public cause, legal services as fringe benefits of employment or union membership, and neighborhood law offices for the poor (pp. 14-26).

But some state and local bar associations, motivated perhaps by the unwarranted fear that new forms of service will bring about a reduction in the number and amount of lawyers' fees, have charged many of these experiments, both in and out of court, with the "unauthorized practice of law." They have succeeded in closing down many of the programs, and in deterring the establishment of others. Even some of the neighborhood legal offices founded by the Federal government have been attacked. Although only a few of these offices have actually been closed by these attacks, their functions have been effectively restricted by pressure from the bar. And although the Illinois Supreme Court's opinion places aid to indigents in a separate category from group services, we shall show that this distinction is unreasoned; it therefore has not protected, and cannot protect, such assistance from attack (pp. 26-34).

The attacks on most of these new experiments should not succeed, because services like that provided members of the Mine Workers Union are constitutionally protected. There is a constitutional right to associate to give and receive legal services. In addition, state-imposed restrictions on the practice of law, in the absence of harm

or the real threat of harm, violate due process. States may enforce canons of legal ethics narrowly focused upon specific real dangers, but may not, as below, employ broad and vaguely stated proscriptions, based on remote hypotheses of harm, to restrict the ways in which lawyers may meet the public's legal needs (pp. 35-45).

ARGUMENT

Introduction

The essential feature of the Illinois Supreme Court's opinion is its theory that, except in the case of legal services to indigents,[1] the unauthorized practice of law is committed whenever the full burden of paying for legal services does not fall squarely upon the client aided.[2] This theory is based upon faulty reasoning and fails to take proper account of the constitutional principles announced in *NAACP* v. *Button,* 371 U. S. 415 (1963) and *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U. S. 1 (1964). Unless disapproved in the clearest terms, it could help suppress the robust development of legal services now taking place in the United States, a development offering, for the first time in our history, the possibility of adequate legal representation for all persons—regardless of economic condition. This brief will survey the dimensions of this revolution, will show how the rigid and unthinking

[1] The court's exception of aid to indigents is unreasoned. As will be shown, the court's reasoning could be used to attack legal programs aiding the poor, and in a number of states this has already happened. See pp. 27-33, *infra.*

[2] *United Mine Workers, District 12* v. *Illinois State Bar Association,* 35 Ill. 2d 112, 117, 219 N. E. 2d 503, 506 (1966).

application of canons of legal ethics has served to stifle new legal service programs across the country, and will suggest a principle for accommodating the legitimate interests protected by the canons of ethics with the need for new forms of legal services.

I.

A Great Gap Exists Between the Legal Services Americans Need and the Legal Services They Can Afford Under the Traditional Fee System.

At an earlier period in American history, it might have been argued that only the wealthy had need of a lawyer to assist with a civil matter. With few exceptions, only the wealthy ever got a lawyer. The principal tasks of the attorney centered around the sale of real property, and persons without property to buy or sell rarely were aware of their need for counsel. But in the twentieth century, the routine need for legal services became manifest. The complexity of our society has increased the occasions of our need for legal services and has heightened our awareness of the need. In his roles as consumer, lessee, vendee or vendor of property, employee, tortfeasor or tort victim, the average American frequently enters into complex relations which may be characterized as, or may result in, a legal problem. He needs legal advice to recognize and vindicate his rights and to prevent his problems from becoming more serious. It is now "difficult to see how any person can attain maturity and at no time have need for legal advice." Pye, *Role of Legal Services in the Anti-Poverty Program*, 31 LAW AND CONTEMP. PROB. 211, 217 (1966).

In the area of criminal law, the increase in demand for legal assistance has been even more dramatic. The broadened right to counsel established by the decisions in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and *In re Gault,* 387 U. S. 1 (1967), has produced so many requests for aid that already overburdened public defenders' offices have been subjected to unprecedented strains.

The legal profession, like the medical profession, has been slow to adapt to the vastly increased demand for services. We are experiencing a shortage of law schools, of lawyers, of judges, of courts. Every court's calendar is severely congested. Unlike doctors, lawyers have not created categories of legal assistants with less training than their own to administer legal first aid.[3] And the legal profession has rigidly insisted upon the exclusive use of a fee system which, together with the low supply and high demand, has priced lawyers far beyond what the average man can pay. Only the relatively wealthy can afford routinely to consult a lawyer about civil matters. In fact, two thirds of lower class and one third of upper class families have never employed a lawyer. Masotti and Corsi, *Legal Assistance for the Poor,* 44 J. URBAN LAW 483, 486 (1967). And a major legal problem is like a major medical problem: one rarely saves in contemplation of such an event; yet should one occur, proper legal help may cost

[3] Law students enrolled in Legal Aid programs are occasionally allowed to assist in the representation of clients, but this practice is permitted in only fourteen states. Silverstein, A Change of Pace Conference on Legal Services, working paper presented to the 1967 American Bar Association Convention, Honolulu, Hawaii, August 6, 1967. There is no legal equivalent of the nurse, hygienist, or other sub-doctor professional.

many thousands of dollars. Only the very rich can afford a legal catastrophe.

The profession's answers to this problem have been legal aid to the indigent and, in some types of cases, contingent fees. The indigent have suffered most from the unavailability of adequate legal assistance. The poor, in fact, probably have more legal problems than most Americans, since indigents often have special needs for help in the fields of welfare,[4] landlord-tenant law,[5] civil rights,[6] domestic relations,[7] consumer problems,[8] and, of course, criminal law. Legal aid societies have never adequately

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[4] The poor often need lawyers to help avail themselves of their rights under the Social Security Act and state welfare laws. Rights are often denied because welfare procedures are much too slow, clients are arbitrarily cut off, and state programs are administered in a way which violates statute and constitutional law, or because of human failure on the part of the administrators. Under the laws, clients have a right to a hearing on any claims they have, but a hearing is a meaningless device to an uneducated indigent without benefit of counsel. See Sparer, *The Welfare Client's Attorney*, 12 U.C.L.A. L. REV. 361 (1965).

[5] Victimization of poor tenants by landlords is not uncommon. But a tenant whose landlord is violating a building code or who is evicting him improperly has no adequate remedy unless he has legal help. See Carlin and Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965).

[6] A person aggrieved by the violation of Titles II (public accommodations) or VII (fair employment) of the Civil Rights Act of 1964, 78 Stat. 243, 78 Stat. 253-266 (1964), requires legal representation, as does one seeking enforcement of state civil rights acts and court decrees which are resisted.

[7] The poor often have problems in this area, and Legal Aid has traditionally been unwilling to assist them in divorce cases. Because the poor have not been able to have legal assistance, our system has been described as a "dual system of family law", ten Broek, *California's Dual System of Family Law*, 16 STAN. L. REV. 257, 900 (1964), which discriminates against the poor by applying different substantive rules.

[8] A missed payment on an installment purchase usually leads to some legal action—sometimes a suit for repossession and acceleration of the balance due. Many employers fire workers whose wages

met the needs of the indigent, despite the dedicated efforts of hundreds of Legal Aid attorneys. First, the establishment of legal aid offices was neither systematic nor comprehensive. Only relatively large cities had any offices at all; the rural and small-town poor were left unaided. Comment, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor,* 80 HARV. L. REV. 805, 807 (1967). Even the large cities were not adequately served. In 1962, nine cities with populations over 100,000 had no legal aid programs, and twenty-four such cities had programs which failed to meet the minimum standards of the American Bar Association. Masotti and Corsi, *Legal Assistance for the Poor,* 44 J. URBAN LAW 483, 487 (1967). Second, the amount of money spent for legal aid was infinitesimal; in 1963, it amounted to less than 2/10 of one per cent of the money spent that year for all legal services in the nation.[9] *Id.* at 487-88.

These quantitative deficiencies naturally produced qualitative shortcomings. To reduce the potential case load to manageable dimensions, legal aid had to set extremely low income eligibility standards. It had to avoid publicity and community education, so that not too many indigents

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are attached. Even a consumer with a perfect defense has no adequate remedy unless he has legal help, and this is true also of a consumer who wishes to avail himself of his rights against a merchant who sold defective goods or failed to deliver. See Carlin and Howard, *supra,* n. 5.

[9] Four million dollars was spent for legal aid in 1963. A budget of thirty million dollars was required in fiscal 1967 to enable the new neighborhood legal offices (see pp. 23-24 *infra*) to serve 400,000-600,000 clients. The chairman of the American Bar Association's committee on legal aid has estimated that there are potentially 14 million indigent cases annually, a volume which would cost between 300 million and 500 million dollars a year if the service were performed by salaried attorneys. The New York Times, August 7, 1967, p. 11, col. 1 (late city ed.).

would know that its services were available. It traditionally refused to help in certain types of cases, such as divorces and bankruptcies, both because of limited funds and because many communities thought of legal aid as charity and did not wish it to assist in the vindication of rights which were vaguely thought of as immoral. And of course, while many talented and self-sacrificing lawyers have worked for legal aid, the low salary and status attached to the position of legal aid attorney discouraged many others from considering the position, so that often a job requiring the talents of a superman was performed by a mediocre attorney. Comment, 80 HARV. L. REV. 805, at 807-09.

One other legal service has been generally available to a person without resources to hire an attorney. If he happens to be a plaintiff, and his complaint happens to be for money damages (usually in personal injury cases), a client can normally have a lawyer prosecute the case for a percentage of the recovery, if successful. At first glance the contingent fee seems like low cost legal service, since the client who has nothing may end up with a large amount of money. Actually the contingent fee is usually a very expensive type of legal service. The lawyer gambles on recovery and, if successful, shares handsomely in the seeming windfall. But, after all, the recovery is not a windfall, but compensation for a loss (often a loss measurable in dollars and cents).[10] The loss of one fourth to one third of this recovery in legal fees is not one that most plaintiffs can "afford", even if it is one they can bear, and contingent

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[10] It may be noted that under the tax law, the recovery of damages for personal injury is not "income." INT. REV. CODE OF 1954 § 104.

Contingent fees are further inadequate as a solution because even clients who do not prevail must pay the attorney's disbursements.

fee arrangements should not be thought of as a solution to the problem of inadequate legal services. And even if it were, it is not a solution for the client who is the defendant in a personal injury case, or is threatened with eviction by his landlord, or is sued on a contract. Nor can it help the client who needs an injunction, or a divorce, or who wants to write a will, change his name, or appeal the revocation of his driver's license. Many millions of people are not poor enough to qualify for legal aid or the assistance of a neighborhood legal office, yet not wealthy enough to afford legal services they genuinely need.[11] Depending upon the complexity of the cases in which they find themselves involved, millions or tens of millions of Americans are "legally indigent." For them, creative elements in the legal profession are developing new forms of legal services at substantially lower cost.

II.

Creative Elements in the Legal Profession Have Recently Undertaken to Develop New Forms of Practice to Satisfy the Manifest Need for More Plentiful, Efficient and Inexpensive Legal Services.

"Group legal services" may be defined as services performed by an attorney for a group with a common problem, including a group which has formed to establish a plan of prepaid legal service, whether or not the members have a common interest in a particular field of activity.[12] Read

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[11] See Cox, *Poverty and the Legal Profession*, 54 ILL. B. J. 12, 15 (1965).

[12] This is a simplified version of the more precise definition formulated by the California Bar Association's Committee on Group Legal Services, in their report to the Association. The report is the leading work on the subject and is published in 39 CAL. STATE B. J. at 639 (1964).

broadly, this definition would include legal aid as a group service, since the indigent are a definable group with common problems, served by a salaried attorney. In the case of legal aid, the services are paid for only partly by the indigents aided, through their United Fund contributions; the rest of society contributes the balance. Since the 1930's, some groups of persons not indigent in the strict sense have experimented with plans to provide themselves with cheaper legal services, for which they pay the entire cost.

A group service performs several functions. It informs the members of the group that some of their problems may be legal ones, and that legal assistance is available. It may help refer them to one of a panel of attorneys.[13] But perhaps the most important function of a group service is to keep the price of legal assistance within a range that members of the group can afford. This is generally done in two ways: (1) by spreading the cost of services performed over the entire group, rather than allowing it to fall upon the member who happens to need a lawyer's help, and (2) by raising the volume of a particular kind of work that the attorney performs, thus lowering the unit cost of the work. See California State Bar Association, Committee on Group Legal Services, *Group Legal Services*, 39 CAL. STATE B. J. 639, 662-67 (1964). Increased volume and the opportunity to specialize can lower the unit cost of work done both by a recommended lawyer who charges a fee in each case and a salaried lawyer retained by the group itself. In the case of a salaried attorney, however, there may be a further reduction in the cost of service, in that an attorney who is guaranteed a particular income

[13] As in *Brotherhood of Railroad Trainmen* v. *Virginia ex. rel. Virginia State Bar*, 377 U.S. 1 (1964).

in a given year may be willing to accept a lesser aggregate amount than if he had to rely on the relatively uncertain income that fees provide.[14]

Early Group Services

Group legal services first became popular in the 1930's. They were frequently offered as one benefit of membership in automobile clubs. In a typical instance, members paid $10.00 annual dues to the club, and if they were charged with a traffic offense or sued for a vehicular tort, they could enlist the services either of an attorney on the club's recommended list or of their own choosing. The club took no part in the case, but it paid the lawyer's bill. Employing reasoning similar to that of the Illinois Supreme Court in the present case, the Supreme Court of Massachusetts found that to purchase in advance, for the nominal sum of $10, all the legal services that might be needed for a year was "utterly at variance with the standards of the legal profession, where the fee . . . is fixed by the nature of the work performed, the skill required and the benefit accruing to the client." The service was enjoined. *In re Maclub,* 295 Mass. 45, 50, 3 N. E. 2d 272, 274 (1936); see *People ex rel. Chicago Bar Association* v. *Chicago Motor Club,* 362 Ill. 50, 199 N. E. 1 (1935); see also Zimroth, *Group Legal Services and the Constitution,* 76 YALE L. J. 966, 966-67 (1967).

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[14] Theoretically the risk-spreading function could be performed independently of the cost-lowering function; members of a group could insure against legal costs without seeking the services of particular lawyers. But the California Committee on Group Legal Services could find no insurance company which was interested in developing a group legal insurance plan. 39 CAL. STATE B. J. 639 at 720 (1964).

Another early group service was the Association of Real Estate Taxpayers. Twenty to thirty thousand property owners contributed fifteen dollars each to a non-profit corporation which was created to bring test suits to protect their property from forfeiture and tax sale. It would have cost an individual $200,000 to bring such a suit. There, as here, the Illinois Supreme Court held that the association constituted a lay intermediary, and declared the arrangement illegal. *People ex rel. Courtney* v. *Association of Real Estate Taxpayers,* 354 Ill. 102, 187 N. E. 823 (1933).

The Copyright Protection Bureau fared better in court. Eight motion picture distributors organized and made contributions to the Bureau. When the Bureau discovered an unauthorized exhibition of a picture, its salaried legal staff could settle or sue the exhibitor. The court costs of the suit were charged to the aggrieved distributor, but the lawyers' salaries were paid by a general assessment against all of the members. The Bureau was held not to be engaged in the unlawful practice of law. Each member had a right to have a legal department to bring suits, and the "mere fact it created its agency for the above purpose under a trade name does not involve any illegality." *Vitaphone Corp.* v. *Hutchinson Amusement Co.,* 28 F. Supp. 526 (D. Mass. 1939). This court, unlike others, did not even dwell on the group nature of the arrangement.[15]

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[15] One author has suggested that this case is distinguishable from the Real Estate Taxpayers case only in that it was brought in a federal court. Derby, *Unauthorized Practice of Law,* 54 CALIF. L. REV. 1331, 1357 n. 149 (1966).

Special Interest Groups

Were it not for the early cases declaring group services unlawful, the most prevalent form of group services today might be those organized by special interest groups whose members have a peculiar need for legal assistance; *e.g.*, automobile clubs. But the ethical rules invoked by local bar associations have impeded the establishment of such group services. For example in California, a large social club whose members belonged to a particular ethnic group wished to hire an attorney to assist them with their common legal problems, especially those dealing with naturalization or their status as aliens. This association was prevented by opposition from the State Bar. California State Bar Association, Committee on Group Legal Services, *Group Legal Services,* 39 CAL. STATE B. J. 639, 686 (1964). The California Teachers' Association, however, does provide its members with some of the advantages of group service. In cases involving the protection of professional rights, teachers may choose their own attorneys and the association will pay 75% of the fee beyond $50 up to $750. *Ibid.* at 676.

The only major "professional association" offering relatively comprehensive legal services to its members is the United States Army. Under a plan set up in 1943, the Army has been providing servicemen and their dependents with free legal advice on all civil matters, "from adoption to wills", *other* than problems dealing with military administration or justice. Although the serviceman must have a civilian lawyer to go to court, all assistance up to that point is provided by the program. See Winkler, Legal Assistance for the Armed Forces, 50 A.B.A.J. 451 (1964).

Defendants' Liability Insurance

The most widespread form of group service, though rarely thought of as such, is the legal assistance given defendants in automobile negligence cases by their liability insurers. The insurance not only protects the insured against liability, but against the legal fees involved in defending a suit. Typically the insurance company will provide an attorney to defend a suit. The cost is borne by all the members of the group of insured drivers, as a part of the premiums paid. Public liability, defamation, and even malpractice insurance also usually cover legal fees.

Institutions Promoting a Cause

Institutions which seek to promote a political or social cause through litigation typically offer a group legal service. They usually retain one or more salaried attorneys who prosecute the cases of litigants from the groups served, who may or may not formally be members of the organization. *Amicus* NAACP Legal Defense Fund has no membership except for its board of directors. With its staff of lawyers and funds it raises for itself it has provided counsel to more or less clearly defined groups: students wishing to attend integrated schools, civil rights workers, Negroes seeking equal opportunity for employment, etc. The NAACP (a membership corporation separate and apart from the Defense Fund) is financed in part by membership dues, in part by private contributions. It too has a legal staff. See *N.A.A.C.P.* v. *Button,* 371 U. S. 415 (1963). The American Civil Liberties Union is similarly financed, and supplies counsel to litigants in selected civil liberties cases.[16] Even local bar associations have offered

[16] The Union once participated in cases principally as *amicus curiae,* but now supplies counsel in 80% of its cases.

this type of group legal service. In 1940, the Atlanta Bar Association established a committee to fight usurious lenders. It advertised that it would provide free legal service to anyone who would sue for recovery of payments made on usurious loans.[17]

Corporation Fringe Benefits

Legal service as a fringe benefit of corporate employment offers limitless possibilities for the extension of low cost legal assistance to millions who need it. It is well known that many companies already offer this service to their executives. In some cases, staff or retained counsel charge the executives a discounted fee or no fee for private services; in others, the fee is the usual fee for the service, but is billed to the corporation.[18] But just as thousands of companies now offer prepaid medical service to all employees, legal aid could be extended either in clinics staffed by company lawyers or through recommended or completely independent attorneys who would be paid by the companies, perhaps charging the clients a small deductible fee. At least one company extended this service to all of its workers; during World War II, a California defense plant employed salaried lawyers to handle the personal legal problems of its employees. The lawyers aided 3,461 employees in 1944, and saved the company an estimated 15,364 man-hours. The program was terminated when the war ended, but company officials said it had succeeded in mini-

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[17] This practice was upheld against a charge by creditors that it was unethical. *Gunnels* v. *Atlanta Bar*, 191 Ga. 366, 12 S.E. 2d. 602 (1940).

[18] This practice, though widespread, is officially considered unethical. See American Bar Association, *Informative Opinion of the Committee on Unauthorized Practice of the Law*, 36 A.B.A.J. 677, 678 (1950).

mizing the objective and subjective effects that legal problems had on workers. See California State Bar Association, Committee on Group Legal Services, *Group Legal Services,* 39 CAL. STATE B. J. 639, 679-81 (1964).

Union Benefits

A few labor unions have devised a variety of means for providing their members with inexpensive legal service. This Court examined one of these plans in *Brotherhood of Railroad Trainmen* v. *Virginia ex. rel. Virginia State Bar,* 377 U. S. 1 (1964). There the Brotherhood had selected, in each region of the country, a lawyer reputed to be honest and skillful. When a member was injured, the union would advise him to see a lawyer and would recommend the lawyer it had selected for that region. The member had to pay the fee, but he was assured the assistance of an expert in railroad injuries, and since the lawyers selected were called upon to perform a high volume of similar work, they charged the members somewhat less than the usual fee.[19]

The United Mine Workers' plan, under attack here, seeks to do somewhat more. The union retains its own salaried attorney, and injured members may choose to avail themselves of his services. This type of plan is much less costly to the members than that of the Trainmen. Local 12 of the Mine Workers has 14,000 members. If the attorney's salary and office expenses amount to $40,000 a year, less than $3.00 of each member's dues is being allocated to "legal insurance." The Mine Workers' plan spreads the risk of

[19] The Brotherhood and the lawyers agreed that a contingent fee of no more than 25% would be charged. When the plan was originally established, workers had to pay attorneys contingent fees of up to 50%. *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 393, 150 N.E. 2d 163, 195 (1958).

legal fees among all its members, and reduces aggregate costs significantly by employing a salaried lawyer.[20]

But even the Mine Workers' plan fails to exploit the full cost-reducing potential of group service. For two years an affiliate of the New York Hotel Trades Council retained a salaried lawyer to advise its members on the full range of legal problems that confronted them as members of society other than those arising from their employment. Most of the work done by the attorney concerned landlord-tenant law and wage attachments by merchants. An infinitesimal portion of the union treasury was spent on this project, but members felt they could consult the attorney freely so as to avoid trouble as well as resolve conflict. Similarly, it is "not uncommon" in California for unions to refer members to the attorney retained by the union for its own affairs, and to pay the fees for the first visit. One California law firm has agreements with five unions, under which it provides service in workmen's compensation cases for all members who wish it, and also gives legal advice without charge to members with personal legal problems. And for several years in the late 1950's the Los Angeles culinary industry had collective bargaining agreements under which management paid an annual sum to a legal aid trust fund. A panel of five lawyers gave union members legal advice for up to one hour per civil problem and the attorneys were reimbursed from the trust fund at the rate of twenty dollars per hour. Most of the problems han-

[20] Another "single issue" service is provided members of the New York State locals of the International Ladies Garment Workers Union. Lay advocates on the union's staff represent union members before administrative panels in contested claims for unemployment compensation. Union lawyers take appeals to court if necessary. The service costs each member pennies a year; each case would cost many hundred times that sum if handled by an outside lawyer.

dled by the panel centered around debtor-creditor and landlord-tenant relationships, and automobile accidents. See California Bar Association, Committee on Group Legal Services, *Group Legal Services,* 39 CAL. STATE B. J. 639, 670-75 (1964).

Legal Assistance Associations

A major recent development in the extention of legal services is the Legal Services Program sponsored and largely financed by the United States government's Office of Economic Opportunity. This program is designed to expand the resources available to indigents by improving on the legal aid concept. The "neighborhood law office" is a key innovative feature. Over six hundred of these offices have been established in communities of every size across the nation. Unlike most legal aid offices, the neighborhood offices are located in the residential districts they serve, not downtown. They are therefore far more accessible to the poor, many of whom rarely leave their neighborhoods. They are often situated in community action centers which offer a variety of services, so that doctors and social workers may easily refer to lawyers clients who do not realize their problems are legal. The neighborhood offices employ salaried attorneys, who attempt to convince neighborhood residents that they are on their side, that they are their advocates—even against government agencies. The attorneys engage in community organization and legal education. They give indigent clients advice on nearly all legal problems, including matrimonial problems, and go to court whenever necessary. Neighborhood offices also differ from legal aid in that they are not reluctant to take appeals when the client so desires. Legal aid seldom succeeded in pressing precedent-making cases, because understaffing required

that nearly all cases be settled, and in those that did go to trial, the small sums involved did not justify the expenses of appeal. But since the neighborhood attorney sees his role as advocate for both the client and the neighborhood (when their interests coincide) he is less likely to discourage an appeal. See generally Comment, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor,* 80 HARV. L. REV. 805 (1967); OFFICE OF ECONOMIC OPPORTUNITY, THE POOR SEEK JUSTICE (1967); OFFICE OF ECONOMIC OPPORTUNITY, FIRST ANNUAL REPORT OF THE LEGAL SERVICES PROGRAM TO THE AMERICAN BAR ASSOCIATION (1966); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR (1964); OFFICE OF ECONOMIC OPPORTUNITY, NATIONAL CONFERENCE ON LAW AND POVERTY (1965). See also Cahn and Cahn, *The War on Poverty: A Civilian Perspective,* 73 YALE L. J. 1317 (1964).

While the neighborhood office is a novel concept, it is by no means the only experimental feature of the program. In fact, "there is no such thing as a 'standard' legal services program. Innovation is encouraged and is limited only by the ingenuity of the developers of a proposal." OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM, GUIDELINES 4 (1966). On New York City's Lower East Side, mobile law offices in trailers search out those so poor and uneducated that even a neighborhood office is too far away. OFFICE OF ECONOMIC OPPORTUNITY, THE POOR SEEK JUSTICE 8 (1967). And in northern Michigan, attorneys for the poor have offices in six towns and ride circuit through areas too sparsely populated to support their own neighborhood offices. OFFICE OF ECONOMIC OPPORTUNITY, FIRST ANNUAL REPORT OF THE LEGAL SERVICES PROGRAM 14 (1966). In

Northern Wisconsin, a program called Judicare is being tested: Indigents take their problems to any attorney, and the government will pay the fee, which is not to exceed 80% of the State Bar's minimum fee schedule. Preliminary data indicate that this program costs at least 50% more than a neighborhood office program of similar scope. Comment, 80 HARV. L. REV. 805, 849 (1967).[21]

Another remarkable experiment of the legal Services Program is the use of lay advocates to assist with minor problems. "Not every injury requires a surgeon; not every injustice requires an attorney . . . We need what is, in effect, a new profession of advocates for the poor . . . That job is too big—and, I would add, too important—to be left only to lawyers." Nicholas deB. Katzenbach, in DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, CONFERENCE PROCEEDINGS: THE EXTENSION OF LEGAL SERVICES TO THE POOR (1964). The Dixwell Legal Rights Association in New Haven, Conn., for example, employs and trains indigents to assist their own neighbors to vindicate their rights. The lay advocates appear for their clients in informal administrative hearings before Welfare Department personnel when welfare rights have been denied. The program's goal is to prevent problems from becoming so complex that the services of a lawyer are required. But if a lawyer is needed, clients are referred to the New Haven Legal Assistance Association.

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[21] The advantages for urban areas of a salaried neighborhood lawyer rather than Judicare have been compiled by Judge Raymond Pace Alexander: Judicare leaves the poor to the yellow pages for names of lawyers; neighborhood offices can train specialists, watch patterns of cases and bring test suits, draft legislation, and provide comprehensive service. *In re Community Legal Services, Inc.*, #4968, Common Pleas #4 (March Term, 1966).

Finally, the Office of Economic Opportunity contemplates that the indigent may some day be served by groups which they themselves form.[22] As poverty is eradicated, the independently financed neighborhood offices may be gradually transformed into classic group services.

III.

The Rigid Employment of the Canons of Ethics by State and Local Bar Associations to Throttle These New Forms Is Retarding Progress Toward Satisfying the Manifest Need for Services.

In 1966, F. William McCalpin, chairman of the American Bar Association's Special Committee on Availability of Legal Services, wrote that *Button* and *Trainmen* had brought to light many apparently long existing, though *sub rosa*, group legal service plans. He cited as an example the service offered its members by the New York Hotel Trades Council, described in the previous section. "Although protests have been made by some segments of the organized Bar," he wrote, "in today's climate the effect of such protestation is doubtful." McCalpin, *A Revolution in the Law Practice*, 15 CLEV.-MAR. L. REV. 203, 205 (1966). The organized Bar has done more than protest. The disciplinary committee of the New York County Lawyers Association, by initiating an investigation of the Hotel Trades Council program, succeeded in closing it down.

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[22] If, despite the indigency of its individual members, a group can afford to hire an attorney, neighborhood offices may refuse to provide free counsel; thus a means test is applied to groups as well as individuals. OFFICE OF ECONOMIC OPPORTUNITY, LEGAL SERVICES PROGRAM, GUIDELINES 21 (1966).

When its salaried attorney resigned to take another job, the union could not find another lawyer willing to fill the position, given the threat of disciplinary proceedings and possible disbarment. The Lawyers Association contended that the group nature of the service might violate ethical principles, and would not accept the union's claim that its activities were protected by the rationale of *Trainmen.* The union's regular attorney says that but for the threat of proceedings by the Bar, filling the position would have been very easy.

Bar opposition to programs extending legal service must come as no surprise to this Court. In *NAACP* v. *Button,* the Court considered the Virginia Bar Association's opposition, on ethical grounds, to an offer of service by the salaried attorneys of a group promoting a cause by means of litigation. In *Brotherhood of Railroad Trainmen,* the Court encountered the Virginia Bar's labeling of a union referral plan as "unauthorized practice." Despite the Court's opinions in those cases, Bar associations have, if anything, intensified their attacks on group services for "unauthorized practice." Bar opposition to group service for the social club of immigrants in California is one instance. What happened to the Hotel Trades Council is another. The Illinois Mine Workers Case is another.

The accusation of "unauthorized practice" has even been leveled at some of the neighborhood law office programs sponsored by the Office of Economic Opportunity. In a number of cities, bar associations have gone so far as to challenge the programs in court. In the District of Columbia, for example, a suit against the legal assistance project has been pending for over a year. *Harrison* v. *United Planning Organization,* Civ. #2282-65 (D. C., D. C.). A temporary restraining

order was secured against the California Rural Legal Assistance Association in Stanislaus County; the order expired, but the Association is now defending a suit on the merits. *Stanislaus Co. Bar.* v. *California Rural Legal Assistance,* #93302 (Superior Ct., Stanislaus Co. (1967)). In Houston, the courts refused to enjoin the program, finding it to be within the "charity" exemption of Canon 35. *Touchy* v. *Houston Legal Foundation,* Doc. #4636 (Ct. Civ. App. 1967). A suit by four bar associations is pending in Florida, *Trautman* v. *Shriver,* #66-188-ORL Civil (D. C., M. D. Fla.), and a private attorney sued the local program in Roanoke Valley, Va., *Jones* v. *Roanoke Valley Legal Aid Society,* #8986 (Hustings Ct., Roanoke, 1967), but recently took a voluntary nonsuit. In other instances, courts in nonadversary proceedings have disapproved on grounds of ethical impropriety aspects of the programs.[23]

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[23] In Onandaga County, New York, the statute permitting charitable corporations to handle civil cases was in June, 1967, held to preclude legal assistance from giving advice or aid in juvenile or criminal cases. *Matter of Pinkert,* #299 (App. Div., 4th Dept., June 29, 1967). Pennsylvania and New York State require charitable corporations which propose to practice law to obtain court approval. Community Legal Services of Philadelphia was warmly endorsed by the Court despite objections from some members of the bar. *In re Community Legal Services, Inc.,* #4968 (Common Pleas #4, March Term 1966). But legal assistance in New York City suffered a very serious setback when the New York Appellate Division disapproved its charter. The proposed association would have had twenty directors: 13 lawyers and seven representatives of the poor. This would have conformed with the requirement in the Economic Opportunity Act that "the poor must be represented on the board or policy-making committee of the program to provide legal services." OFFICE OF ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM, GUIDELINES 11 (1966); see 75 Stat. 516 (1964). This was one feature of the program objected to by the court. The court seemed to say that a program would commit unauthorized practice unless every member of the board of directors were an attorney. *In re Community Action for Legal Services, Inc.,* 26

In some other cities, bar groups have effectively opposed the neighborhood law office programs without actually going to court. What happened in New Haven is illustrative. During 1963, the Legal Aid Committee of the New Haven County Bar Association approved the plans for the formation of the New Haven Legal Assistance Association, although the issue was never formally presented to the Bar Association in a general meeting. In 1964, as the Legal Assistance Association was preparing to begin operations, it informed the Bar candidly of its plans. In an extremely bitter meeting of the County Bar Association on November 16, 1964, after a debate centering around the need for the program and the concept of unauthorized practice, the Bar Association voted to go on record "as opposing the entire program." VERBATIM PROCEEDINGS, MEETING OF THE NEW HAVEN COUNTY BAR ASSOCIATION, November 16, 1964 (copy on file in the Yale Law Library); see Parker, *The Relations of Legal Service Programs with Local Bar Associations,* in OFFICE OF ECONOMIC OPPORTUNITY, NATIONAL CONFERENCE ON LAW AND POVERTY 126 (1965). The Connecticut State Bar Association subsequently found the program consistent with the Canons of Ethics, and the neighborhood law offices were opened, but the county bar has continued to challenge the propriety of the program. Defending the program before committees of the County Bar Association has consumed much of the neighborhood lawyers' time; the program's executive director estimates that during the program's first

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App. Div. 2d 354, 361, 274 N.Y.S. 2d 779, 787-88 (1966). As a result of this case, New York City's legal services program, though approved and funded by the federal government in July 1966, is not yet in operation (although a few neighborhoods do have minuscule services).

year of operations, one third of his time was spent negotiating with the local bar. Thus even where legal assistance programs prevail, ethical challenges by local bar associations can have serious adverse effects on their ability to fulfill their intended purposes.

Furthermore, although actual attacks have been sporadic, legal assistance programs everywhere have had to make two major concessions to the organized bar. First, the federal program ignores the concept of "legal indigency" i.e., of indigency in relation to the costs of a particular case. Instead, a rigid means test is imposed. A family of four with an income of $5200 per year may not take advantage of the program, even if hiring a lawyer to help them would cost several hundred or even several thousand dollars. In some rural areas the qualifying income level is $2000. For a single person, the eligibility level ranges from $1200 in rural areas to $3380 in a few cities. OFFICE OF ECONOMIC OPPORTUNITY, FIRST ANNUAL REPORT OF THE LEGAL SERVICES PROGRAM 9 (1966). Second, neighborhood law offices may not provide free legal advice in cases which a lawyer would handle for a contingent fee, notwithstanding that a contingent fee may reduce significantly a much needed compensatory recovery. "The test should be whether the client can obtain representation." OFFICE OF ECONOMIC OPPORTUNITY, LEGAL SERVICES PROGRAM, GUIDELINES 20 (1966). These two rules assuage the Bar's dominant concern: that neighborhood law offices not take business from local attorneys. That concern is reflected in the reasoning by which the Canons of Ethics and the Illinois Supreme Court put programs assisting "indigents" in a special category. Unfortunately, these two rules severely limit the ways in which the neighbor-

hood law offices could help fill the unsatisfied need for legal services at a cost that most families can afford.

It may at first seem odd that despite the two rules limiting the scope of legal assistance associations, and despite Canon 35's specific exemption of programs aiding indigents, and despite the American Bar Association's warm endorsement of the federal neighborhood law office program, local bar groups have continued to make ethical attacks on legal assistance to the poor in every part of the country. But this phenomenon should not be too surprising. Local bar associations are often dominated by independent practitioners whose annual profits are often much in doubt and who fear even a slight loss of clientele to free assistance programs. In New Haven, all of the 24 lawyers in attendance from firms of over 10 voted to support the program, but single practitioners voted 111-33 to oppose it. Parker, *The Relations of Legal Service Programs with Local Bar Associations,* in OFFICE OF ECONOMIC OPPORTUNITY, NATIONAL CONFERENCE ON LAW AND POVERTY 126, 131 (1965). See also CARLIN, LAWYERS ON THEIR OWN (1962); CARLIN, LAWYERS ETHICS 23-36 (1966) (clientele of solo practitioners and a statistical profile of the New York County Lawyers Association). And "it is not safe to assume that members of the local bar or leaders of the local bar association have any knowledge of, or sympathy for, the cause of legal aid in its traditional form or of the pronouncements of the American Bar Association or of the state bar association on the subject, let alone any knowledge of, or sympathy for, a program of extended legal service." Parker, *The Relations of Legal Service Programs with Local Bar Associations,* in OFFICE OF ECONOMIC OPPORTUNITY, NATIONAL CONFERENCE ON LAW AND POVERTY 126 (1965).

Further, the exception contained in Canon 35 and in the opinion of the Illinois Supreme Court cannot really protect service for indigents from ethical attack, for it is founded upon no logic whatsoever. The Illinois Court fears a possible conflict of interest which might divert a salaried attorney's true loyalty from his client to the union executive board which controls his paycheck. But a neighborhood lawyer's hypothetical conflict of interest is not a whit different. He is bound to serve his client, but his salary is paid either entirely by the federal government, or, in most cases, 90% by the federal government and 10% by a local public or private fund. And he is responsible to an executive committee which hired him, an executive committee perhaps more interested in questions of legal policy than the executive board of the Mine Workers Union. Given the rationale of the Illinois court's opinion, no legal assistance program can feel assured that a court will not carry it to its logical conclusion. In fact, the reasoning of the Illinois court threatens legal assistance even more than it does classic group service, since typically a member of a group plan has some control over the hired attorneys, some voice, directly or indirectly, in how his money is spent. By contrast, indigents have only the most remote control, as voters in federal elections, over the operations of the Legal Services Program.[24] The fragility of the exemption for programs aiding indigents is made

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[24] In addition, indigents may have a degree of control through representatives of the poor on the programs' policy boards, but those representatives need not have voting power, much less majority voting power, and in many areas the provision of the statute requiring such representation is not being complied with. See Comment, *Participation of the Poor: Section 202(a)(3) Organizations Under the Economic Opportunity Act of 1964*, 75 YALE L. J. 599 (1966).

further evident by the obvious truth that indigents no less than wealthy men deserve the complete loyalty of their attorneys.

Confusion over the scope of the constitutional rights described in *Button* and *Trainmen* has rendered vulnerable the entire spectrum of new group services, from corporate and union fringe benefits and facilities of private associations to the neighborhood law offices sponsored by the federal government. The nature of these rights must now be clarified so that lawyers may continue the great experiments they have begun in expanding legal service in the United States. Canons of Ethics inappropriate to modern needs should not be permitted to stifle these efforts.

In 1964, a committee of the California State Bar Association recommended that the Rules of Professional Conduct be amended to allow, with appropriate safeguards, the institution of group legal service plans, including plans under which groups hired salaried attorneys, California State Bar Association, Committee on Group Legal Services, *Group Legal Services,* 39 CAL. STATE B. J. 639, 723-26 (1964). A few months ago, the Board of Governors of the California Bar "noting [*Trainmen* and *Button*] nevertheless concluded that it is not in the interest of the public or the administration of justice to apply the principles of those decisions to legal service plans at the expense of certain Rules of Professional Conduct. Except as they conflict with the Supreme Court decisions, these rules will continue to be enforced." STATE BAR OF CALIFORNIA REPORTS, May-June, 1967, p. 1, col. 1. Among the reasons given by the Board was that modification of the Rules would be "premature" in view of the pendency of this case. *Ibid.* The American Bar Association, too, is seeking

guidance as to the extent of the rights established by this Court's earlier decisions. Partially as a result of the shock which the Association received in *Trainmen*,[25] it established a Special Committee on Evaluation of Ethical Standards. See Cheatham, *A Re-evaluation of the Canons of Professional Ethics*, 33 TENN. L. REV. 129, 130 (1966). The decision in this case may have even a more profound effect than *Trainmen* on the availability of legal service in America. "The crucial importance of this case cannot be minimized. Many unauthorized practice cases have been of vital concern to specific areas of the unauthorized practice movement, but this case above all holds the key to how, and in what manner, attorneys are to practice law in contemporary times." American Bar Association, Standing Committee Unauthorized Practice of the Law, *Current Report*, 32 UNAUTHORIZED PRACTICE NEWS 56, 65 (1966).

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[25] Forty-eight state bar associations joined in the petition for rehearing which this Court denied. California State Bar Assn., Committee on Group Legal Services, *Group Legal Services*, 39 CAL. STATE B. J. 639, 699 (1964).

IV.

There Is a Constitutional Right to Associate to Give and Receive Legal Services Within Any Institutional Framework Which Adequately Protects Clients From Injury. The Implementation of This Right Is Wholly Consistent With the Fulfillment of the Mission of the Canons of Ethics and the Recognition of New Legal Forms to Meet New Legal Needs.

States have a legitimate interest in protecting persons who seek legal advice from being defrauded, from being assisted by persons incompetent to deal with their problems, and from being victimized by lawyers unable to accord them their complete loyalty. The protection of these interests has been the traditional mission of the Canons of Ethics. But where there is no danger of injury, we submit, potential clients have a right to associate to receive legal services, and lawyers have a right to provide those services, regardless of whether the lawyer charges the client a fee. The ethical rules against unauthorized practice, corporate practice, and lay intermediaries were not written to harass lawyers wishing to experiment with systems of payment other than the fee and should not be so employed by respondents and other bar associations today. These rules, and the valid interests they protect, are fully reconcilable with the constitutional right to associate to bring or defend a lawsuit.

There is a constitutional right to associate to bring or defend a lawsuit.

In *N.A.A.C.P.* v. *Button,* this court reviewed a form of group legal service performed by *amicus* NAACP Legal Defense Fund and the NAACP, two institutions which

pursue a social cause by means of litigation. In the arrangement to which the Court accorded constitutional protection, the NAACP had hired a staff of fifteen Virginia attorneys, who were paid at a per diem rate of up to sixty dollars a day plus expenses, a sum smaller than the compensation ordinarily received for equivalent private professional work. 371 U. S. at 420-21. Like the Mine Workers, members of the NAACP received a particular kind of legal service at a cost much lower than that which would prevail under a fee arrangement, and they paid for it in advance, indirectly, through payment of dues to the association.[26] It is true that the main issue in that case was solicitation rather than group services, and the Court read the Virginia decree broadly as proscribing "any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys," not only the plan actually employed by the N.A.A.C.P. But the Court, clearly aware that the attorneys were paid *per diem* by the Association, see 371 U. S. at 420, and that the organization was "financing litigation," 371 U. S. at 447 (concurring opinion of Mr. Justice White), explicitly stated that "here the *entire arrangement* employs constitutionally privileged means of expression" 371 U. S. at 442 (emphasis added). In addition, the Court stated that "*nothing* that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or

[26] In *Button*, most of the attorneys received their compensation for each day of service rendered, rather than for each year, but there, as here, the money came from the association, not the client. And the general counsel of the NAACP who directed the litigation did receive an annual salary, as did all of the staff attorneys of the NAACP Legal Defense Fund.

control of litigation which would constitutionally authorize the application of [the Virginia statute]." 371 U. S. at 444 (emphasis added). In other words, neither the mere fact that the group paid the attorney serving its members, nor the *possibility* that the group would have an interest in establishing a precedent which would be contrary to an individual client's interest,[27] was sufficient to support the state's claim of a supervening state interest.[28] The Court noted the total absence of a demonstrated *actual* conflict of interest: "the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants." 371 U. S. at 443. And it must be noted that the plan held to be protected in *Button* was not one falling under any exception for assistance to indigents; although most of the clients could not afford the high costs of complex litigation, there was no indication that they were indigent by any ordinary standard.

The Illinois Supreme Court sought to distinguish *Button* on the ground that the civil rights litigation which the N.A.A.C.P. encouraged was entitled to some special constitutional protection, which "cannot as such be equated with the bodily injury litigation with which we are concerned here." 35 Ill. 2d 112, 123, 219 N. E. 2d 503, 509 (1966). Indeed, some language in the *Button* opinion supports this reading. See 371 U. S. at 431. But the *Trainmen* case demonstrates that constitutional protection of the

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[27] Compare Mr. Justice Harlan's dissenting hypothetical, 371 U.S. at 462, with the Illinois Supreme Court's hypothetical, 35 Ill. 2d 112, 121, 219 N.E. 2d 503, 508 (1966).

[28] This Court has also noted, in *Trainmen*, that British unions "retain counsel to represent members in personal lawsuits, a practice similar to that which we upheld in *Button*." 377 U.S. at 7.

associational right to litigate does not depend on the subject matter of the group's litigation. Vindication of federal statutory rights, as in *Trainmen,* state statutory rights, as here, and common law rights are equally important social objectives. Tort suits are of public concern both as vindication of rights and as a means of changing the law affecting the entire public. "[P]rivate suits affect the public in all cases, not just the big ones. In deciding a tort case, a court sets its course in future torts cases. Every future tort claimant is affected, as is every insurance company, and therefore every policyholder. As the circle gets larger the effect diminishes, but the cumulative effect of the torts cases on the public is great." Zimroth, *Group Legal Services and the Constitution,* 76 YALE L. J. 966, 989 (1967). The pecuniary motives of the tort plaintiff do not diminish the public importance of his suit; as Zimroth points out, N.A.A.C.P. members suing for integrated schoolrooms may have desired for their children the pecuniary advantages of a better education. *Ibid.* It therefore appears that the members of the Mine Workers' Union, no less than the members of the NAACP, have a constitutional right to join together to hire a lawyer to promote their interests by giving them legal advice and assistance.

Lawyers have a constitutional right to work for a group on a salary basis in the absence of a showing of actual danger of injury to clients.

Fourteenth Amendment theory for reversal of the decision below may be formulated in another way. This Court has long held that the "liberty" protected from state action by the due process clause includes freedoms not specifically enumerated in other sections of the Constitution. "While

this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual . . . to engage in any of the common occupations of life. . . ." *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), citing dictum in the *Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36 (1872). At the time that *Meyer* was decided, it was held that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U. S. at 399-400. In recent years the Court has refined this doctrine: today "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Griswold* v. *Conn.*, 381 U. S. 479, 497, 504 (1965) (concurring opinions of Mr. Justice Goldberg and Mr. Justice White), *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960). See *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964): where the state police power trenches upon a constitutionally protected freedom, "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[29] Thus the right to engage in the practice of law,

[29] In *McLaughlin*, the Court was dealing with a liberty protected by the equal protection clause, not an unenumerated freedom. But this distinction is not significant, for the unenumerated liberties are as fundamental as those which are listed. See the concurring opinion of Mr. Justice Goldberg in *Griswold* v. *Conn.*, 381 U.S. at 486.

like the right to pursue any other occupation, is one which the state may regulate and control, but it may not do so merely on the basis of remote hypotheses of potential harm. Regulation must be *necessary* to the protection of the state's residents. See *McLaughlin* v. *Florida, supra,* 379 U. S. at 197 (concurring opinion of Mr. Justice Harlan).

This rule does not require the courts to act as super-legislatures sitting in judgment on the wisdom of state regulatory legislation. The task of the courts is merely to judge whether the justifications which the state offers for its controls are genuine, realistic fears of harm, or simply makeweight arguments devised to shore up vague and insubstantial, or illegitimate, or non-existent state policies. This is a function which courts have been performing routinely for years. In *Meyer,* Nebraska offered as a justification of its ban on instruction in German that the law would promote civic development and enable the children to become citizens of the most useful type, yet the Court found this to be "no adequate reason" in time of peace. 262 U. S. at 401-402. In *McLaughlin,* the state argued that its anti-cohabitation law was designed to prevent breaches of the basic concepts of sexual decency, but the Court saw no reason why the particular statute, one which infringed upon personal liberty, was necessary. In *Schware* v. *Board of Law Examiners,* 353 U. S. 232 (1957), a case dealing with the right to practice law, see 353 U. S. at 239 n. 5, the state sought to prevent Schware from practicing law because he had used aliases, had been arrested several times, and had been a member of the Communist Party, yet the Court held that "there is no evidence in the record which rationally justifies a finding" that he was morally unfit. The court noted that the State had ample

means to discipline Schware if he were to engage in real misconduct, but that it was improper for the state to infer from his record that he would cause actual injury to his clients or anyone else. 353 U. S. at 246-247, 247 n. 20. The state in *Griswold* offered several possible justifications for its law proscribing the use of contraceptives, but even the argument from administrative convenience was described as "fanciful." 381 U. S. at 506 (concurring opinion of Mr. Justice White). "At most the broad ban is of marginal utility to the declared objective." 381 U. S. at 507 (concurring opinion of Mr. Justice White). Finally, in the recent case of *Fenster* v. *Leary*, —— N. Y. —— (Court of Appeals, July 7, 1967), the New York Court of Appeals considered the state's argument that the New York vagrancy law was necessary to "prevent there coming into existence a 'class of able bodied vagrants . . . [supporting] themselves by preying on society and thus [threatening] the public peace and security.'" But the Court had no trouble in determining that the statute punished conduct "which in no way impinges on the rights or interests of others and which has in no way been demonstrated to have anything more than the most tenuous connection with prevention of crime and preservation of the public order," and it ruled that the law was an unconstitutional deprivation of due process.

In a sense, these cases represent the sometimes feared return of "substantive due process." Cf. McCloskey, *Economic Due Process and the Supreme Court—An Exhumation and Reburial*, 1962 S. Ct. Rev. 34, 59-62 (1962). If so, they demonstrate that if kept within proper bounds, the doctrine is not unmanageable. The judicial process is fully competent to distinguish real from imagined harm. In any event, the present case requires no extension of the doc-

trine beyond its present bounds. In *Meyer*, the Court upheld the right of a teacher to teach in the language he chose to willing students, in the absence of real injury to anyone. In *Griswold*, the Court protected the right of a doctor to give birth control information to his patients, in the absence of demonstrated harm. Surely an attorney has a corresponding right to provide legal services to willing clients, for a fee, for a salary, or for nothing at all, unless the state can show that his doing so leads to a more than speculative danger of injury.

Under either constitutional theory, the state's legitimate interest in protecting clients from injury may be reconciled with satisfaction of the clients' needs for legal services.

The Illinois Supreme Court suggests that lawyers should be allowed to provide group legal service to indigents, but not to clients who are able to pay. This rule serves only one principle: that the organized bar should keep all paying clients and leave those who cannot pay to the government, private charity, and those attorneys who will volunteer their time.[30] It does not even pretend to protect from abuse those for whom group service would be permitted. It is impractical because, as has been pointed out,[31] there is no sharp line between indigents and non-indigents.[32] And, most importantly, it turns its back on the demonstrated need for new forms of legal services.[33]

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[30] See pp. 30-31, *supra*.

[31] See pp. 10-11, 14, 30, *supra*.

[32] It may be noted that persons in a middle income bracket may take advantage of the British Legal Aid system and pay a portion of the costs. See Utton, *The British Legal Aid System*, 76 YALE L.J. 371, 375 (1966).

[33] See pp. 9-14, *supra*.

Another rule is implicit in the Illinois court's opinion: look to the nature of the proposed institution, and, if an evil can be conjured, the state may proscribe the arrangement. Thus the court stated that, "[c]*onceivably,* the interest of the former [union] might be best served by utilizing a particular case as a testing vehicle for appellate review of untried legal theories in the hope of securing a determination beneficial to union members collectively in future litigation, whereas the injured member may prefer a proffered settlement deemed wholly adequate to him." 35 Ill. 2d 112, 121, 219 N. E. 2d 503, 508 (1966) (emphasis added). The state bar association did not allege one instance of this type of conduct. In fact, the opinion reveals that the general practice of the union attorney was to reach the best settlement possible for the client and then suggest that the client accept it. The court's *a priori* style of reasoning is, however, rather common in this field. An American Bar Association committee, commenting on the practice of corporations offering their employees legal services as fringe benefits, has said, "whether the attorney is paid for his services by the corporation, whether the work for the individual is included in his general corporate retainer, or whether he is paid at all, is unimportant. The fact is that the services, in such cases, are rendered because of the attorney's employment by the corporation, and the vice is that there is a divided allegiance." American Bar Association, *Informative Opinion of the Committee on Unauthorized Practice of the Law,* 36 A. B. A. J. 677, 678 (1950). Other vague horribles have been imagined: "What is the position of the union member using the union lawyer, or of the employee using the employer-furnished lawyer, if he should become involved in a scandalous matrimonial situation . . . from which the organization's lawyer must learn of reprehensible traits or conduct . . . ? And what is the position of the group-supplied law-

yer?" Reisler, *Legal Services for All—Are New Approaches Needed?*, 39 N. Y. S. B. J. 204, 208 (1967).

Against these speculations might be measured the equally plausible conflicts of interest inherent in present methods of representation. A contingent fee lawyer, for example, might be under enormous pressure to settle a case for nine hundred dollars, if it would take only an hour to reach such a settlement, rather than spend several days litigating it although his client is likely to be awarded twice that amount. Such a lawyer would perhaps press his client, against his best interests, to accept such a settlement.

In a leading article, Zimroth has pointed out that all such speculation contradicts the normal assumptions which must be made about the legal profession. We do not assume that a lawyer defending an antitrust case for a small client will sacrifice his clients' interests to those of other, larger clients who may want a contrary precedent. Nor do we assume that he will allow his personal desires or associations, or the causes he espouses, or the desires of other members of his partnership, to interfere with his service to his client. When abuse does take place, it will not be hard to detect, for dissatisfied clients will complain. Zimroth, *Group Legal Services and the Constitution*, 76 YALE L. J. 966, 977 (1967).

The appropriate adjustment between state interests and constitutional rights is to permit the state to punish a practice only upon a showing that the practice has resulted in actual harm to a client or some other person, or to restrain a practice only upon a showing of manifest danger, and then only by a regulation narrowly directed at the threatened harm. Thus, Illinois could constitutionally pro-

hibit a salaried union attorney from representing both plaintiff and defendant where both were members of District 12, and could require the union in that case to retain outside counsel. But Illinois may not prohibit group services entirely just because cases of real conflict may be imagined. As shown above, this rule of requiring prohibitions which may infringe upon constitutional rights to be narrowly focused is the rule traditionally applied by the Court in both First Amendment and due process cases.

Neither the contingent fee bar nor any other segment of the legal profession need fear from our suggested disposition. Possibly the widespread existence of group services will require contingent rates to become lower and therefore more competitive with other forms of service, but this may well be made up for by an aggregate increase in effective demand for lawyers. The advent of group medical service, medical insurance, and Medicare raised the income of doctors by raising demand closer to the level of community need, and all available evidence suggests that this phenomenon will apply also to law. In fact, "in California's Alameda County where a pioneer OEO program has been operating for over a year and a half, the number of referrals to the County Bar Association Referral Service quadrupled. And in New Haven [contrary to the fears of members of the County Bar Association], the County Bar Association reported that referrals have increased threefold since 1963." OFFICE OF ECONOMIC OPPORTUNITY, FIRST ANNUAL REPORT OF THE LEGAL SERVICES PROGRAM TO THE AMERICAN BAR ASSOCIATION 9 (1966). Far from damaging the profession, constitutional protection for the fledgling legal services revolution will aid significantly fulfillment by lawyers of their promise and their duty to the American public.

CONCLUSION

The traditional lawyer-client relationship has proven inadequate to meet contemporary needs for legal service. Diversity and experimentation in the provision of legal assistance must be ensured so that Americans may enjoy in reality the rights which are in theory theirs. Rules of ethics have a place in preventing abuses, but should not be allowed to impede unduly the development of new ways of providing and paying for legal service; broad and vague rules cannot constitutionally be applied merely because potential harm to potential clients can be hypothesized. For the foregoing reasons, we submit that the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 33

UNITED MINE WORKERS, DISTRICT 12,

Petitioner,

—v.—

ILLINOIS STATE BAR ASSOCIATION; *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Motion for Leave to Participate in Oral Argument

The NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, respectfully move the Court for permission to participate in oral argument. Movants recognize that such permission is granted only rarely; we submit, however, that this is an extraordinary situation.

Although decisions of this Court typically have widespread effects, affecting rights of thousands of persons not parties to the case decided by the Court, this case has even broader ramifications. As a committee of the American Bar Association has noted, "this case above all holds the key to how, and in what manner, attorneys are to

practice law in contemporary times" (brief, p. 34). If the Court accepts our suggested disposition of the merits, its decision will ensure that the legal services revolution will continue to flourish, so that for the first time, all Americans will be able to enjoy the rights to which they are entitled. The right to have rights is itself affected.

No *amicus* can truly speak for all the millions of persons in need of legal services. But our unvarying objective has been to extend legal services to those in need, and we feel that we can help inform the Court about that need and the ways in which it might be satisfied.

WHEREFORE, movants respectfully request permission to participate in oral argument.

Respectfully submitted,

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